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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 Lydia Daywitt,

No. CV-15-02476-PHX-BSB

10 Plaintiff,

**ORDER**

11 v.

12 Carolyn W. Colvin,

13 Defendant.

14  
15 Plaintiff Lydia Daywitt seeks judicial review of the final decision of the  
16 Commissioner of Social Security (the Commissioner) denying her application for benefits  
17 under the Social Security Act (the Act). The parties have consented to proceed before a  
18 United States Magistrate Judge pursuant to 28 U.S.C. § 636(b), and have filed briefs in  
19 accordance with Rule 16.1 of the Local Rules of Civil Procedure. The Court reverses the  
20 Commissioner's decision and remands for further proceedings.

21 **I. Procedural Background**

22 In October 2012, Plaintiff filed an application for a period of disability and  
23 disability insurance benefits and, in January 2013, she filed an application for  
24 supplemental security income. (Tr. 356-57, 366-71).<sup>1</sup> Plaintiff alleged a disability onset  
25 date of August 1, 2010. (Tr. 201.) After the Social Security Administration (SSA)  
26 denied Plaintiff's initial applications and her request for reconsideration, she requested a  
27 hearing before an administrative law judge (ALJ). After conducting a hearing, the ALJ

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28 <sup>1</sup> Citations to Tr. are to the certified administrative transcript of record. (Doc. 13.)

1 issued a decision finding Plaintiff not disabled under the Act. (Tr. 182-89.) This  
 2 decision became the final decision of the Commissioner when the Social Security  
 3 Administration Appeals Council denied Plaintiff's request for review. (Tr. 1-6.) *See also*  
 4 20 C.F.R. § 404.981 (explaining the effect of a disposition by the Appeals Council).  
 5 Plaintiff now seeks judicial review of this decision pursuant to 42 U.S.C. § 405(g).

6 **II. Administrative Hearing and Record**

7 Plaintiff was forty-eight years old as of the alleged disability onset date. (Tr. 188.)  
 8 She had a high school education and past relevant work as a truck driver. (*Id.*) At the  
 9 administrative hearing, Plaintiff testified that she is unable to work due to back pain, deep  
 10 vein thrombosis, edema, and use of a walker. (Tr. 204, 206-08.) She also complained of  
 11 mental health issues, including depression. (Tr. 213-14.) The record before the Court  
 12 includes medical treatment records and opinions related to Plaintiff's alleged physical  
 13 and mental impairments. The Court does not discuss these records in detail because, as  
 14 discussed below, the parties agree that the ALJ committed reversible error in relation to  
 15 his consideration of Plaintiff's mental impairments.

16 **III. The ALJ's Decision**

17 A claimant is considered disabled under the Social Security Act if she is unable  
 18 "to engage in any substantial gainful activity by reason of any medically determinable  
 19 physical or mental impairment which can be expected to result in death or which has  
 20 lasted or can be expected to last for a continuous period of not less than 12 months."  
 21 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(a)(3)(A) (nearly identical standard  
 22 for supplemental security income disability insurance benefits). To determine whether a  
 23 claimant is disabled, the ALJ uses a five-step sequential evaluation process.  
 24 *See* 20 C.F.R. §§ 404.1520, 416.920.

25 **A. The Five-Step Sequential Evaluation Process**

26 In the first two steps, a claimant seeking disability benefits must initially  
 27 demonstrate (1) that she is not presently engaged in a substantial gainful activity, and  
 28 (2) that her medically determinable impairment or combinations of impairments is severe.

1 20 C.F.R. §§ 404.1520(b) and (c), 416.920(b) and (c). If a claimant meets steps one and  
2 two, there are two ways in which she may be found disabled at steps three through five.  
3 At step three, she may prove that his impairment or combination of impairments meets or  
4 equals an impairment in the Listing of Impairments found in Appendix 1 to Subpart P of  
5 20 C.F.R. Part 404. 20 C.F.R. §§ 404.1520(a)(4)(iii) and (d), 416.920(d). If so, the  
6 claimant is presumptively disabled. If not, the ALJ determines the claimant's residual  
7 functional capacity (RFC). 20 C.F.R. §§ 404.1520(e), 416.920(e). At step four, the ALJ  
8 determines whether a claimant's RFC precludes her from performing her past relevant  
9 work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant establishes this *prima facie*  
10 case, the burden shifts to the government at step five to establish that the claimant can  
11 perform other jobs that exist in significant number in the national economy, considering  
12 the claimant's RFC, age, work experience, and education. 20 C.F.R. §§ 404.1520(g),  
13 416.920(g). If the government does not meet this burden, then the claimant is considered  
14 disabled within the meaning of the Act.

15 **B. The ALJ's Application of the Five-Step Evaluation Process**

16 Applying the five-step sequential evaluation process, the ALJ found that Plaintiff  
17 had not engaged in substantial gainful activity since the alleged disability onset date.  
18 (Tr. 184.) At step two, the ALJ found that Plaintiff had the following severe  
19 impairments: "chronic bronchitis; diabetes mellitus; hypertension; hyperlipidemia;  
20 obesity; chronic venous insufficiency; (20 CFR 404.1520(c) and 416.920(c))." (*Id.*) The  
21 ALJ concluded that Plaintiff did not have a severe mental impairment. (*Id.*) At step  
22 three, the ALJ found that Plaintiff did not have an impairment or combination of  
23 impairments that met or equaled the severity of a listed impairment. (Tr. 185.) The ALJ  
24 found that Plaintiff had the residual functional capacity (RFC) to "perform light work as  
25 defined in 20 CFR 404.1567(b) and 416.967(b)." (Tr. 186.) The ALJ clarified that  
26 Plaintiff "can frequently climb ramps/stairs; occasionally climb ladders, ropes, [or]  
27 scaffolds; frequently balance and stoop; occasionally kneel, crouch, [and] crawl; [and]  
28 should] avoid concentrated exposure to fumes, odors, dusts, gases, [and] poor

1 ventilation.” (Tr. 186.) The RFC did not include any limitations related to Plaintiff’s  
 2 mental health. (*Id.*)

3 The ALJ concluded that the transferability of job skills was not material to a  
 4 determination of disability because using the Medical-Vocational Rules as a framework  
 5 supported a finding that Plaintiff was not disabled. (Tr. 188.) The ALJ concluded that  
 6 considering Plaintiff’s age, education, work experience, and RFC, there were jobs that  
 7 existed in significant number in the national economy that Plaintiff could perform. (*Id.*)  
 8 The ALJ determined that Plaintiff had not been under a disability, as defined in the Act,  
 9 from August 1, 2010 through the date of his decision. (Tr. 189.) Therefore, the ALJ  
 10 denied Plaintiff’s application for a period of disability and disability insurance benefits  
 11 and her application for supplemental security income. (*Id.*)

12 **IV. Standard of Review**

13 The district court has the “power to enter, upon the pleadings and transcript of  
 14 record, a judgment affirming, modifying, or reversing the decision of the Commissioner,  
 15 with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The district  
 16 court reviews the Commissioner’s final decision under the substantial evidence standard  
 17 and must affirm the Commissioner’s decision if it is supported by substantial evidence  
 18 and it is free from legal error. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996);  
 19 *Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1198 (9th Cir. 2008). Even if the  
 20 ALJ erred, however, “[a] decision of the ALJ will not be reversed for errors that are  
 21 harmless.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

22 Substantial evidence means more than a mere scintilla, but less than a  
 23 preponderance; it is “such relevant evidence as a reasonable mind might accept as  
 24 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 25 (citations omitted); *see also Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). In  
 26 determining whether substantial evidence supports a decision, the court considers the  
 27 record as a whole and “may not affirm simply by isolating a specific quantum of  
 28 supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (internal

1 quotation and citation omitted). The ALJ is responsible for resolving conflicts in  
2 testimony, determining credibility, and resolving ambiguities. *See Andrews v. Shalala*,  
3 53 F.3d 1035, 1039 (9th Cir. 1995). “When the evidence before the ALJ is subject to  
4 more than one rational interpretation, [the court] must defer to the ALJ’s conclusion.”  
5 *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004) (citing  
6 *Andrews*, 53 F.3d at 1041).

7 **V. Plaintiff’s Claims**

8 Plaintiff raises the following claims: (1) the ALJ erred in assessing Plaintiff’s RFC  
9 because he did not consider the combined effects of all of Plaintiff’s impairments,  
10 including depression; (2) the ALJ erred by rejecting the opinions of treating and  
11 examining physicians in favor of a non-examining physician’s opinion; (3) the ALJ erred  
12 in weighing Plaintiff’s reported symptoms; and (4) the ALJ erred by failing to provide  
13 sufficient reasons for rejecting lay witness testimony. (Doc. 16 at 8-24.)

14 In response, the Commissioner states that the ALJ’s decision contains reversible  
15 error at step two of the sequential evaluation process. (Doc. 23 at 6.) The Commissioner  
16 states that, at step two, the ALJ found no severe mental impairments and indicated that  
17 the record did not contain limitations from a treating physician. (*Id.*) On appeal of the  
18 ALJ’s decision, Plaintiff submitted over 200 pages of medical records including “about  
19 175 pages of mental health records” that the ALJ did not have the opportunity to  
20 consider. (*Id.* at 6, 17.) The Commissioner states that these records “undermin[e] the  
21 ALJ’s reasons.” (*Id.* at 6.) The Commissioner asserts that this matter should be  
22 remanded for further proceedings to permit the ALJ to consider the additional medical  
23 records. (*Id.* at 16.) Plaintiff argues that the Appeals Council should have considered the  
24 records and asserts that the Court should remand for an award of benefits. (Doc. 26.)  
25 Based on the Commissioner’s concession of reversible error, the Court reverses the  
26 Commissioner’s decision. Therefore, the Court must determine whether to remand for  
27 further proceedings or for an award of benefits.

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1       **VI. Remand for Further Proceedings**

2       The decision to remand for benefits is controlled by the Ninth Circuit’s “three-part  
3 credit-as-true standard.” *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). Under  
4 that standard, evidence should be credited as true and an action remanded for an  
5 immediate award of benefits when each of the following factors are present: “(1) the  
6 record has been fully developed and further administrative proceedings would serve no  
7 useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting  
8 evidence, whether claimant’s testimony or medical opinion; and (3) if the improperly  
9 discredited evidence were credited as true, the ALJ would be required to find the  
10 claimant disabled on remand.” *Id.* (citing *Ryan v. Comm’r Soc. Sec.*, 528 F.3d 1194,  
11 1202 (9th Cir. 2008)).

12       The first factor of the credit-as-true standard is not met when the record is not  
13 fully developed and further administrative proceedings would be useful. *See Garrison*,  
14 759 F.3d at 1020. To determine whether the first factor is met the court “consider[s]  
15 whether the record as a whole is free from conflicts, ambiguities, or gaps, whether all  
16 factual issues have been resolved, and whether the claimant’s entitlement to benefits is  
17 clear under the applicable legal rules.” *Treichler*, 775 F.3d at 1103-04. The Court  
18 concludes that the ALJ should have the opportunity to evaluate medical records that post-  
19 date the ALJ’s decision and to consider those records along with other medical evidence  
20 and assessments in the record.

21       After the ALJ’s decision, Plaintiff submitted additional medical records to the  
22 Appeals Council. (Tr. 2.) These records include the following: (1) a March 20, 2015  
23 statement from Plaintiff’s treating physician, Dr. Jacqueline Carter, that Plaintiff could  
24 not “maintain a daily job” (Tr. 2, 9); (2) an October 7, 2014 statement from registered  
25 nurse (RN) Rachel Daley that Plaintiff could not “sustain[] gainful employment”  
26 (Tr. 178); and, (3) 175 pages of mental health records that post-date the ALJ’s decision.  
27 (Tr. 2.)

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1        In its decision, the Appeals Council considered “the additional evidence listed on  
 2 the enclosed Order of Appeals Council.” (Tr. 2.) The Appeals Council identified that  
 3 evidence as Plaintiff’s February 23, 2015 statement, Plaintiff’s October 21, 2014 brief,  
 4 and a May 23, 2014 prescription by Dr. Wang. (Tr. 5.) Based on its review of that  
 5 evidence and Plaintiff’s arguments, the Appeals Council found no grounds for changing  
 6 the ALJ’s decision. (Tr. 2.) The Appeals Council noted that Plaintiff had submitted  
 7 additional evidence, including RN Daley’s October 7, 2014 statement, Dr. Carter’s  
 8 March 20, 2015 statement, medical records from Banner Ironwood Medical Center dated  
 9 January 26, 2015 to February 3, 2015, and medical records from Aurora Behavioral  
 10 Health System dated January 28, 2018 to February 2, 2015. (*Id.*) The Appeals Council  
 11 did not consider that evidence because it was dated after August 22, 2014, the date on  
 12 which the ALJ issued his decision. (*Id.*) Plaintiff argues that the Appeals Council should  
 13 have considered the evidence that post-dated the ALJ’s decision because those medical  
 14 records reflect ongoing medical care. (Doc. 26 at 2); *see* 20 C.F.R. § 404.970(b). The  
 15 Commissioner concedes error related to the Agency’s treatment of this evidence.  
 16 (Doc. 23 at 2.) As discussed below, the Court remands this matter to permit the ALJ to  
 17 consider this evidence.

18        In *Brewes v. Comm’r of Soc. Sec.*, 682 F.3d 1157 (9th Cir. 2012), the Ninth Circuit  
 19 held that “when a claimant submits evidence for the first time to the Appeals Council,  
 20 which considers that evidence in denying review of the ALJ’s decision, the new evidence  
 21 is part of the administrative record, which the district court must consider in determining  
 22 whether the Commissioner’s decision is supported by substantial evidence.” *Id.* at 1163.  
 23 Plaintiff argues that under *Brewes*, this Court can consider the evidence that she  
 24 submitted to the Appeals Council and need not remand this matter to give the ALJ the  
 25 opportunity to do so. (Doc. 26 at 3.) The Court concludes that *Brewes* does not support  
 26 Plaintiff’s argument because that case is distinguishable.

27        Unlike *Brewes*, the Appeal Council did not consider the evidence that post-dated  
 28 the ALJ’s decision. The Appeals Council explained that the ALJ decided Plaintiff’s case

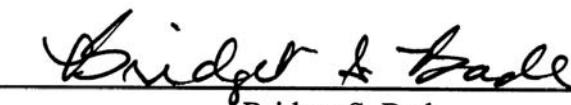
1 through August 22, 2014, the date of the ALJ's decision, but the "new information [was]  
2 about a different time." (Tr. 2); *see Rocha v. Astrue*, 2012 WL 748260, at \*4 (D. Ariz.  
3 Mar. 7, 2012) (stating that the Appeals Council did not "consider" evidence when it  
4 stated that it looked at evidence but did not make it part of the administrative record).  
5 Because neither the ALJ nor the Appeals Council considered evidence that post-dated the  
6 ALJ's decision, but that reflected Plaintiff's ongoing medical care, the Court concludes  
7 that further administrative proceedings would be useful to permit the ALJ to consider that  
8 evidence and reassess his decision. *See Garrison*, 759 F.3d at 1020; *Smolen*, 80 F.3d at  
9 1292 (the court has discretion to remand for additional findings or for an award of  
10 benefits.). On remand, the ALJ may conduct a new hearing, further consider the medical  
11 evidence, including the evidence that post-dates his August 22, 2014 decision, reassess  
12 Plaintiff's RFC, reassess the five-step sequential evaluation, and issue a new decision.

13 Accordingly,

14 **IT IS ORDERED** that the Commissioner's decision is reversed and this matter is  
15 remanded for further proceedings as set forth in this order.

16 **IT IS FURTHER ORDERED** that the Clerk of Court is directed to enter  
17 judgment in Plaintiff's favor and terminate this matter.

18 Dated this 27th day of January, 2017.

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22 Bridget S. Bade  
23 United States Magistrate Judge  
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